

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LEON SERGOLD, OFFICER OF	:	DETERMINATION
ALFRIEDMAN KNITTING MACHINERY, INC.	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1977	:	
through May 31, 1980.	:	

Petitioner, Leon Sergold, officer of Alfriedman Knitting Machinery, Inc., c/o Peter M. Stern, 330 West 42nd Street, New York, New York 10036, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1977 through May 31, 1980 (File No. 800480).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on July 10, 1989 at 1:15 P.M., with all briefs submitted by November 1, 1989. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction over a petition to revise taxes alleged to be due where a notice of determination under Tax Law § 1138 has not been issued.

II. Whether a determination of tax due which is calculated on 125% of taxes reported for prior tax periods is permissible under the Tax Law.

III. Whether Leon Sergold is an officer of Alfriedman Knitting Machinery, Inc. who as such officer is under a duty to comply with the Sales and Use Tax Law within the meaning of Tax Law § 1131(1) so as to be responsible under Tax Law § 1133(a) for sales tax due from Alfriedman.

IV. Whether Alfriedman Knitting Machinery, Inc. (which is not a party to this proceeding) owes sales taxes as determined or whether it is entitled to a credit under Tax Law § 1132(e) and 20 NYCRR former 525.5 for sales taxes previously collected on sales that were cancelled.

FINDINGS OF FACT

Petitioner, Leon Sergold, acknowledges having been an officer of Alfriedman Knitting Machinery, Inc. ("Alfriedman"), and having signed some of the sales tax returns that were filed by Alfriedman in his capacity as an officer of the corporation. While petitioner does not contest his responsibility for delinquent sales taxes, he does contend that the liability for these taxes should be shared equally with the other officers of the corporation.

Alfriedman started in the used knitting machine equipment business in 1977 and ceased operations in 1979. At the onset of the enterprise, Alfriedman's stockholders were Alan Friedman, Leon Sergold and an unidentified third party. Alfriedman's business involved purchasing used knitting machinery, making the necessary repairs if required, and then selling or leasing this equipment to knitting companies, including out-of-state and foreign companies. A typical leasing agreement was for 60 months in duration with an option to purchase the equipment at the expiration of the lease for one dollar.

Alfriedman ceased doing business when Manufacturers Hanover Trust Company, as a secured creditor, seized all of the corporation's equipment for nonpayment of a loan. In the last months of Alfriedman's operations, the corporation could not service its leased equipment which resulted in customers cancelling lease agreements. However, in spite of Alfriedman's financial problems, the corporation never filed for nor advanced through bankruptcy proceedings.

There exists a minimal claim that Alfriedman may have reported its purported leases of equipment as sales and paid taxes on a grossed-up amount of the lease payments. There exists no evidence to support this contention. Mr. Sergold failed to produce any evidence to substantiate his claim of grossed-up sales payments and has no recollection of the placement of any accounting records or where his former bookkeeper may be reached to verify petitioner's contention.

(a) A Notice and Demand for Payment of Sales and Use Taxes Due was issued on July 24, 1981 against Leon Sergold for the period March 1, 1977 through May 31, 1979 in the amount of \$9,887.44, plus penalty of \$2,471.79 under Tax Law § 1145 and interest of \$4,217.06, for a total amount due of \$16,576.29. (This notice states that petitioner is liable as an officer under Tax Law §§ 1131(1) and 1133(a) for the taxes determined to be due in accordance with Tax Law § 1138. It does not inform the recipient of any rights to a hearing.)

(b) This notice calculates tax only for the sales tax quarters ending May 31, 1977, August 31, 1977, November 30, 1977 and for the quarters ending August 31, 1978 and May 31, 1979. These are quarters for which Alfriedman had filed sales tax returns but had not paid the tax. (It thus does not cover four quarters during the time period for which the notice was issued.)

(a) A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued on the same date against Leon Sergold for sales and use taxes for the period June 1, 1979 through November 30, 1979 in the amount of \$8,366.26, plus penalty under Tax Law § 1145 of \$2,049.73 and interest of \$1,498.73, for a total amount due of \$12,214.72. These amounts were estimated on the basis of 125% of the sales tax reported for the period ending November 30, 1977 (the highest period for which returns were available).

(b) A notice of determination was issued on July 30, 1981 for the period December 1, 1979 through May 31, 1980 in the amount of \$8,366.26, plus penalty of \$1,798.74 under Tax Law § 1145 and interest of \$2,760.85, for a total amount due of \$12,925.85. These amounts were estimated on the basis of 125% of the sales tax reported for the period ending November 30, 1977.

CONCLUSIONS OF LAW

A. The taxes for the period March 1, 1977 through May 31, 1979 were asserted on the basis of tax returns admitting to such liability filed by Alfriedman on which no payment had

been made. In this case, the Division of Taxation did not issue a notice of determination (which would have informed the recipient of his rights to an administrative hearing), but rather issued a notice and demand with the intention, apparently, of proceeding by warrant under Tax Law § 1141(b). Where there is no notice of determination there is no right to an administrative hearing. Furthermore, even if a notice of determination had been issued under Tax Law § 1138, an administrative hearing was not authorized under the Tax Law for the periods in issue where, as here, the tax is based on a liability admitted to be due on filed tax returns (Matter of Hall v. New York State Tax Commn., 108 AD2d 488). The taxpayer does have a remedy in this situation by means of a declaratory judgement action in court (Stacy v. State of New York, 82 Misc 2d 181). Therefore, no hearing can be granted with respect to petitioner's liability for this period and such issue cannot be decided in this proceeding.¹

B. Tax Law § 1138 provides that when tax returns are incorrect or insufficient the tax may be determined from "such information as may be available" and, if necessary, on the basis of "external indices". It has been held that a determination which increased sales for the same period by 25% is not one determined "from such information as may be available" nor is it "estimated on the basis of external indices" (Matter of Roncone, State Tax Commission, March 11, 1986 [TSB-H-86(83)S]). In this case, the

determinations for the periods June 1, 1979 through November 30, 1979 and for December 1, 1979 through May 31, 1980 were based on a 25% increase over a prior period's sales. This, on the theory of the Roncone case, is clearly arbitrary and such notices must be cancelled.

C. The issues of whether petitioner is responsible for the asserted taxes and of whether a credit is due against the amount of such taxes because of cancelled sales are academic in this proceeding and need not be decided.

D. The petition of Leon Sergold, officer of Alfriedman Knitting Machinery, Inc., is dismissed with respect to the period March 1, 1977 through May 31, 1979. The petition is granted for the period June 1, 1979 through May 31, 1980 and for such period the notices of determination are cancelled.

DATED: Troy, New York
March 15, 1990

/s/ Nigel G. Wright
ADMINISTRATIVE LAW JUDGE

¹It is noted that the Tax Law has been amended in order to confer jurisdiction to conduct an administrative hearing to determine the liability of a corporate officer for sales and use taxes due for a period where the corporation has filed a correct and sufficient return (Tax Law § 1138[a][3][B], as added by L 1985, ch 65, § 82, eff April 17, 1985). However, this amendment has no bearing on notices issued prior to the effective date of the amendment (cf., Matter of Robert Stern, Tax Appeals Tribunal, September 1, 1988).